COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 029395-95**
George Sicaras	Employee
Westfield State College	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Horan and Fabricant)

APPEARANCES
Pamela Manson, Esq., for the employee
Thomas J. Murphy, Esq., for the self-insurer

MCCARTHY, J. The employee appeals from a decision in which an administrative judge denied and dismissed his claim for permanent and total incapacity benefits for a work-related coronary injury. Because the decision is erroneous as to the applicable law on proving permanent and total incapacity, we reverse the decision and recommit the case for further findings.

The employee sustained a coronary injury in 1995 that was determined to be work-related in a prior hearing decision, filed on September 23, 1998. That injury resulted in an artery bypass. (Dec. 1-2.) In that 1998 decision, the judge found medical restrictions that nonetheless allowed the employee to perform office work that entailed normal levels of stress. The judge therefore awarded partial incapacity benefits, assigning a "fairly large earning capacity, based on [the employee's] significant transferable skills, level of education, and work background." (Dec. 3.)

By the time the present claim for § 34A benefits came before the judge at the § 10A conference, the employee's benefits under both §§ 34 and 35 had been exhausted. The judge's conference order directed the self-insurer to commence payment of § 34A benefits, and the self-insurer appealed to a full evidentiary hearing. (Dec. 2.) The parties agree that the balance of the temporary total incapacity benefits under § 34 had been paid

per a § 19 agreement,[1] after the exhaustion of § 35 benefits ordered by the decision in 1998. (Employee Brief, 1; Self-insurer Brief, 1.)

The employee underwent a § 11A medical examination. The impartial physician diagnosed the employee as suffering from coronary artery disease which was significantly exacerbated by the 1995 work injury. The doctor opined that the employee was significantly and permanently disabled, and suffered from shortness of breath. The doctor felt that the employee should avoid stress and not lift heavy objects, walk up hills or go out in very cold weather. (Dec. 3.)

The judge found that the impartial physician's physical restrictions were not "all that different from the time of the hearing in 1998." (Dec. 3.) The judge further found that the impartial physician's opinion was that the employee could still perform office work. The judge then noted that the employee had not looked for work within his restrictions at any time, and that the employee now felt that he had been out of the market for too long a time to make a job search anything but futile. (Dec. 3, 4.)

The judge concluded:

> I find that this failure to pursue work of any sort is a choice he has made. If he is now unable to find consultant work because of the amount of time he has been out of the field, that was his choice. I am not convinced that his physical restrictions,

---

[1] General Laws c. 152, § 19(1) provides that:

> Except as otherwise provided by section seven, any payment of compensation shall be by written agreement by the parties and subject to the approval of the department. Any other questions arising under this chapter may be so settled by agreement. Said agreements shall for all purposes be enforceable in the same manner as an order under section twelve.
>
> Any withdrawal of a complaint for discontinuance of compensation shall be made in writing and filed with the department and the employee. The parties shall be deemed to have agreed to all of the findings contained in a written decision of an arbitrator on a case forwarded to arbitration pursuant to the provisions of section ten. The department shall approve any agreement received on a prescribed form unless such agreement is deemed to be in violation of law. Any agreement not approved shall be returned to the party submitting it. Except as provided by section ten B, a party to any agreement under this chapter may file a complaint with the superior court to vacate or modify such agreement on grounds of law or equity.

> as limiting as they may be, restrict him from all types of consulting or even lighter duty administrative work in the security field. He has not looked for work of any sort since that last hearing. Without evidence of some sort of job search I am not persuaded that he is, in fact, totally and permanently disabled.

(Dec. 3-4.) The judge therefore denied the employee's claim for § 34A benefits. (Dec. 4.)

The employee argues that the judge erred by requiring him to prove that his medical condition had worsened in order to qualify for § 34A benefits: "Frankly, [the employee's] physical restrictions do not appear to be all that different from the time of the hearing in 1998." (Dec. 3.) The employee contends that the effect of the § 19 agreement placing him on § 34 relieved him of the requirement to show a worsening. Cf. Foley's Case, 358 Mass. 230, 232 (1970)(employee required to prove worsening when going from § 35 to § 34A). The employee argues that the § 19 agreement established total incapacity, leaving him to prove only that his incapacity merely continued and was unlikely to improve. See Holmes v. Baybank, 16 Mass. Workers' Comp. Rep. 322, 324 (2002). We agree.

On the surface, the judge's imposition of the worsening requirement into this case might appear to be correct. This is because:

> "an agreement to pay compensation 'stands in a position analogous to an unappealed conference order, as it is similarly unsupported by findings of fact and a judicial decision on the merits. Hovey v. Shaw Indus., 16 Mass. Workers' Comp. Rep. 136, 139 (2004). Such findings on the merits of a claim are necessary for the invocation of res judicata principles upon which the Foley 'worsening' prerequisite is based."

Listaite v. Worcester Telegram & Gazette, 17 Mass. Workers' Comp. Rep. 485, 488 (2003)(footnote omitted). However, Listaite and Hovey were agreements to pay *partial* incapacity benefits, unlike the agreement to pay total in the present case. The distinction is crucial. Partial incapacity benefits represent a calculation of earning capacity that takes into account medical restrictions applied to an employee's vocational profile. Under Foley, one must know the restrictions from

which the "worsening" is to be measured. In a § 19 agreement, there are no findings upon which a "worsening" comparison can be made, therefore, "worsening," based on medical restrictions that are greater than before cannot be proved, and fairly cannot be part of the employee's burden of proof.

Such is not the case with total incapacity benefits. A glib truism is nonetheless accurate: "Total is total." There is no range of total from which to calculate any change in the employee's status to qualify for permanent and total incapacity benefits. Therefore, when the self-insurer agreed to pay § 34 benefits prior to the employee's § 34A claim, such agreement established that the employee *was*, indeed, totally incapacitated for the time period covered by that agreement. See Kareske's Case, 250 Mass. 220, 224 (1924). The prior status of partial incapacity ordered in the judge's prior 1998 decision ceased to exist as of the execution and departmental approval of the § 19 agreement.[2] Accordingly, the employee did not need to prove a "worsening" under Foley, and the judge's finding implicating that standard cannot stand. Recommittal is appropriate for the judge to reassess medical disability and resultant incapacity without the imposition of the Foley "worsening" requirement.

Two further matters will need to be addressed on recommittal. The judge found that the employee's failure to seek work was a controlling factor in his incapacity analysis: "Without evidence of some sort of job search I am not persuaded that he is, in fact, totally and permanently disabled." (Dec. 4.) This finding needs a second look.

In Giannakopoulos v. Boston College, 18 Mass. Workers' Comp. Rep. 241 (2004), we followed the lead of the Appeals Court in Mulcahey's Case, 26 Mass. App. Ct. 1, 4 (1988), which limited the holding of Ballard's Case, 13 Mass. App. Ct. 1068 (1982). Giannakopoulos at 242 n. 2.

[2] The parties may, with board approval, execute a § 19 agreement with the specific notation that such payment of benefits directed therein are made "without prejudice to either party," meaning that the insurer is not bound to acceptance of the underlying entitlement, and the employee will not be subject to recoupment. Such an agreement would not relieve the employee of the Foley worsening requirement when weekly partial incapacity benefits are paid by hearing decision, as in this case.

> We consider that the self-insurer's reliance on the proposition just quoted above [that an employee must show attempts to obtain work to support a claim for total incapacity benefit] does not take into account the context of Ballard's Case.
>
> . . .
>
> While evidence of attempts to secure employment can be pertinent in particular cases, where an employee's medical limitations and transferable skills suggest the appropriateness of that inquiry (see McCann's Case, [286 Mass. 541 (1934)]), we decline to implement a prerequisite to receipt of total incapacity benefit[s] that the act does not. See LaFlam's Case, 355 Mass. 409, 411 (1969); Svedberg v. Roy & Gagnon Plumbing & Heating Co., 4 Mass. Workers' Comp. Rep. 160 (1990)(no outright duty of employee to seek work to prevail on claim for permanent and total incapacity benefits).

Giannakopolous at 243-244. On recommittal, the judge should pursue his incapacity analysis without reference to the employee's failure to seek work. Finally, we note that the insurer raised G.L. c. 152, § 1(7A), in defense of the employee's claim, as the medical evidence suggested a non-compensable pre-existing coronary artery disease.[3] (Dec. 1, 3.) The judge did not make findings necessary to address the various elements to that section. The judge must address those elements on recommittal. See Vieira v. D'Agostino Associates, 19 Mass. Workers' Comp. Rep. ___ (2005).

The decision is reversed and the case recommitted for further findings consistent with this opinion.

So ordered.

Filed: ***March 31, 2005***

William A. McCarthy	Mark D. Horan	Bernard W. Fabricant
Administrative Law Judge	Administrative Law Judge	Administrative Law Judge

[3] General Laws c. 152, § 1(7A) provides, in pertinent part:

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.